

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

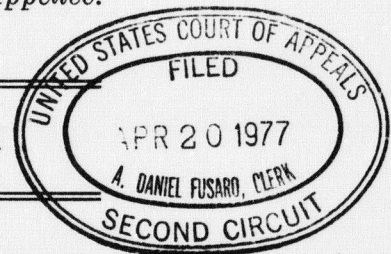
77-7076

United States Court of Appeals
For the Second Circuit

ZIMMEL ASSOCIATES,
a New York Limited Partnership,
Plaintiff-Appellant,
against

WARNER BROS., INC.,
Defendant-Appellee.

APPELLANT'S APPENDIX



BERG AND DUFFY
Attorneys for Plaintiff-Appellant
3000 Marcus Avenue
Lake Success, N. Y. 11040
(516) 354-2500

STROOCK & STROOCK & LAVAN
Attorneys for Defendant-Appellee
61 Broadway
New York, N. Y. 10006
(212) 425-5200

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
Docket Entries	A- 1
Complaint	A-1-A
Notice of Motion	A-12
Affidavit of Laurence Greenwald in Support of the Motion	A-14
Exhibit A to Laurence Greenwald Affidavit	A-19
Affidavit of James P. Duffy, III, in Opposition to Motion	A-28
Exhibit 1 to James P. Duffy, III, Affidavit	A-32
Memorandum and Order	A-42

76C 1001**MEL ASSOCIATES vs WARNER BROS, INC.**

DATE

PROCEEDINGS

6-1-76	Complaint filed. Summons issued.	(1) (cg)
6-10-76	Summons set. and <i>filed</i> executed.	(2)
7-12-76	By DOOLING, J-Stip. dtd 7-9-76, <i>extending A's time to answer</i> that the time of the debt to answer the complaint is extended to 8-30-76. <i>filed</i>	(3)
8-17-76	By PRATT, J-Stip. dtd 8-16-76, <i>extending defendant's time</i> the complaint is extended to 12-1-76. <i>filed</i> to answer	(4)
10-5-76	Notice of motion with memo of law ret. 11-12-76 to dismiss filed	(5/6)
11-4-76	Affidavit of James P. Duffy III, filed.	(7)
11-4-76	Memo of law in opposition to the motion to dismiss, filed.	(8)
11-10-76	Reply memo of debt in further support of motion to dismiss, filed.	(9)
11-12-76	Before PRATT, J. - Case called. Motion for an order dismissing count 1 of complaint argued. Decision reserved.	
1-13-77	By Pratt, J. - Memorandum and order dtd 1-12-77 granting debt's motion to dismiss the complaint. <i>filed</i> . Copies mailed to parties.	(10)
1-13-77	Judgment that the plntff recover nothing of the defendant and that the debt's motion to dismiss the complaint is granted and the complaint is dismissed, <i>filed</i> .	(11)
2/8/77	Notice of appeal. <i>filed</i> . Copies sent to Cof A.	(12)
2/28/77	Scheduling order from Court of Appeals, record <i>to</i> be filed on 3/7/77. <i>filed</i> .	(13)

Clerk's Certificate

14

BEST COPY AVAILABLE

COMPLAINT

A-1-A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

ZIMMEL ASSOCIATES, a New York
Limited Partnership,

Plaintiff,

-against-

WARNER BROS., INC.,

Defendant.

COMPLAINT

Civil Action
No.

-----X

Plaintiff by its attorneys, Berg and Duffy, for
its complaint against defendant alleges as follows:

Count I

(1) Plaintiff is a limited partnership duly
organized and existing under the laws of the State of New
York, and maintains its principal place of business at 776
Kearny Drive, North Woodmere, Nassau County, New York.

(2) Upon information and belief, defendant Warner
Bros., Inc. ("Warner Bros."), is a corporation organized and
existing under the laws of the State of Delaware and has a
principal place of business the State of New York at 75
Rockefeller Plaza, New York, New York.

(3) The matter in controversy exceeds the sum or
value of \$10,000 exclusive of interest and costs.

(4) Plaintiff's claim against defendant arises under the antitrust laws of the United States, 15 U.S.C. §1 et seq, and this court has jurisdiction over the action pursuant to the said antitrust laws and 28 U.S.C. §§1331, 1332, 1337; the venue of the action is founded upon 28 U.S.C. §1391.

(5) The unlawful acts and violations hereinafter alleged have been and are in part carried out and made effective within the Eastern District of New York and the State of New York. The interstate trade and commerce hereinafter described is carried out in part within the Eastern District of New York and Warner Bros. transacts business within this District.

(6) On or about December 17, 1974, plaintiff entered into an agreement with Cinerama International Films Establishment, a Lichtenstein corporation, whereby for valuable consideration plaintiff purchased a motion picture entitled "Beyond the Door," including the exclusive right to exhibit, distribute, and otherwise exploit the Picture in the United States of America and its territories.

(7) On or about December 18, 1974, plaintiff entered into an agreement with Film Ventures International pursuant to which plaintiff, among other things, granted to Film Ventures, International the exclusive license to distribute,

exhibit, and otherwise exploit "Beyond the Door" in the United States and its territories.

(8) In accordance with the terms of the agreement between plaintiff and Film Ventures, International, plaintiff has the right to receive, in varying percentages, a portion of the gross receipts from the theatrical distribution of "Beyond the Door" by Film Ventures, International.

(9) On or about May 1975, Film Ventures, International commenced distribution of "Beyond the Door" throughout various geographical market areas of the United States, including the metropolitan New York area.

(10) On or about 1973 and 1974 Warner Bros. created, produced, and commenced to distribute a motion picture entitled "The Exorcist."

(11) Plaintiff, as the owner and licensor of the motion picture "Beyond the Door," and defendant as the owner and upon information and belief, the distributor, of the motion picture "The Exorcist," are competitors within common geographic markets including the metropolitan New York area, and are competitors whose products or commodities are the same or substantially similar -- i.e. motion pictures detailing the "demonic possession" of individuals.

(12) Upon information and belief, defendant Warner Bros. is producing and intends to distribute throughout the United States and foreign nations a sequel or sequels to

"The Exorcist," which new motion pictures will also deal with the concept of demonic possession.

(13) On or about August 1975 Warner Bros. commenced an action against Film Ventures International, in the central district of California, case No. CV75 2774, wherein Warner Bros. alleged, among other things, that the motion picture "Beyond the Door" infringed Warner Bros. purported copyrights in the motion picture "The Exorcist" and copied its photoplay.

(14) On or about September 1975, Warner Bros. commenced an action in the Central District of California against Mann Theaters Corporation of California, and Pacific Theaters Corporation, in the Central District of California, seeking to enjoin the exhibition of the motion picture "Beyond the Door" by said defendants for the same purported reasons asserted in the action against Film Ventures International.

(15) On or about November 1975 Warner Bros. commenced an action in the United States District Court for the District of Colorado against Highland Theaters Incorporated, an owner and operator of motion picture theaters which exhibited or were presently exhibiting for profit "Beyond the Door"; Warner Bros. again alleged that Highland Theaters' exhibition of "Beyond the Door" violated Warner Bros.' copyrights in "The Exorcist."

(16) Upon information and belief Warner Bros. has also commenced purported infringement actions against exhibitors of "Beyond the Door" in United States District Courts in Chicago, Illinois, and New Orleans, Louisiana, claiming that the exhibition of the motion picture, "Beyond the Door," infringes upon "The Exorcist."

(17) Upon information and belief, Warner Bros. has commenced a lawsuit against American International Pictures, Incorporated, in the United States District Court for the Central District of California, as distributor of the motion picture "Abby" wherein Warner Pros. again alleged that said motion picture, which deals with the concept of demonic possession of an individual, infringed Warner Bros.' copyrights to "The Exorcist."

(18) Upon information and belief, Warner Bros. has threatened other motion picture exhibitors who were in the process of exhibiting "Beyond the Door," or who had gross receipts from said distribution which were payable to Film Ventures International, with economic and legal reprisals for their exhibition of "Beyond the Door," which has resulted in certain exhibitors refusing to exhibit "Beyond the Door," or after the exhibition thereof, to withhold payments to Film Ventures International.

(19) Upon information and belief, all of the above infringement suits commenced by Warner Bros. were brought in bad faith and utilized by Warner Bros. as an integral part of a scheme to restrain and monopolize or intimidate actual and potential competitors, and were oppressive and unwarranted.

(20) Upon information and belief, the foregoing conduct and actions on the part Warner Bros. constitute a purposeful and deliberate attempt to maintain or acquire monopoly power with respect to motion pictures which have as their central theme the demonic possession of individuals, and to exclude competition in the relevant markets throughout the United States, including the metropolitan New York area.

(21) Upon information and belief, the foregoing said conduct and actions on the part of Warner Bros. constitutes the employment of methods, means, and practices to accomplish the monopolization, or create a dangerous probability of monopolization, in favor of Warner Bros. with respect to the distribution and exploitation of motion pictures dealing with the concept of demonic possession.

(22) Upon information and belief, the foregoing conduct and actions on the part of Warner Bros. constitutes an abuse of the copyright laws of the United States, and an attempt by Warner Bros. to tie-in a non-protectible commodity

with motion pictures and other commodities for which Warner Bros. is duly protected under the copyright laws of the United States.

(23) Upon information and belief, the foregoing conduct and the actions on the part of Warner Bros., were undertaken by Warner Bros. notwithstanding that it knew none of the material in its motion picture "The Exorcist" alleged to have been copied by the motion picture "Beyond the Door" is original or copyrightable under the laws of the United States and that said actions were undertaken with the specific intent to gain a monopoly in the entertainment media over the subject matter of demonic possession.

(24) Upon information and belief, as a result of Warner Bros.' conduct and actions as set forth above, and continuing to date, Warner Bros. has attempted to monopolize the trade and commerce among several states in motion pictures dealing with the demonic possession of individuals, with the intent and objective to increase its profits from the continued exhibition of the motion picture "The Exorcist", and with the intent and objective to maximize its box office receipts from the exploitation and exhibition of the sequel or sequels to "The Exorcist," which Warner Bros. intends to introduce into the relevant market areas, including the metropolitan New York area, in the near future.

(25) Upon information and belief, the direct and proximate results of the aforesaid conduct and actions of Warner Bros., are, among other things, to unreasonably restrain and foreclose interstate trade and commerce regarding the exhibition and exploitation of demonic possession motion pictures, and to foreclose and limit competition for said products.

(26) The direct result of Warner Bros.' conduct and actions as set forth above is that plaintiff has received no payments under the distribution agreement with Film Ventures, International by reason of Warner Bros.' pending infringement action, and that plaintiff has lost profits that would have been received from the distribution of its motion picture, and has suffered a decrease in value of its investment in its property, the motion picture "Beyond the Door."

(27) Plaintiff has not yet ascertained the total damages it has sustained, but is informed and believes, and therefore alleges upon information and belief, that those damages are in excess of \$1,000,000.

Count II

(28) Plaintiff incorporates herein and realleges the allegations set forth above in paragraphs (1) through

(27) of this complaint, as if the same were fully set forth herein.

(29) This claim is for relief from unfair competition, and the court has jurisdiction thereof pursuant to 28 U.S.C. §1332; venue is founded upon 28 U.S.C. §1391.

(30) Upon information and belief, defendant Warner Bros. has in bad faith maliciously and without justification communicated to exhibitors of plaintiff's motion picture "Beyond the Door," or prospective exhibitors thereof, that plaintiff's motion picture infringed upon Warner Bros.' copyrights in "The Exorcist," and that Warner Bros. would prevail in lawsuits commenced upon said alleged infringements, and Warner Bros. has communicated that plaintiff's motion picture is inferior, and that the exhibitors would suffer economic harm if they exhibited or continued to exhibit the motion picture "Beyond the Door."

(31) As a direct and proximate result of the aforesaid misconduct and unfair competition on the part of Warner Bros., plaintiff has suffered damages in that it has lost sales and profits it would have made from the exploitation of the motion picture "Beyond the Door."

(28) Plaintiff has not yet ascertained the total damages it has sustained, but is informed and believes, and

therefore alleges upon information and belief that those damages are in excess of \$1,000,000.

WHEREFORE, plaintiff prays:

(1) for an injunction prohibiting Warner Bros., its officers, agents, servants, employees, attorneys, and those persons acting in concert or participation with them from suing or threatening to sue plaintiff and any other party or entity involved with the distribution and exploitation of the motion picture "Beyond the Door";

(2) that defendant Warner Bros. be adjudged to have violated the antitrust laws of the United States, including 15 U.S.C. §2;

(3) for an injunction permanently and appropriately restraining defendant Warner Bros. from further violations of the antitrust laws of the United States;

(4) that under the first and second counts of the complaint, plaintiff be awarded actual damages in excess of \$1,000,000, or such other amount as the court may determine, and that plaintiff have judgment for threefold the amount of its damages sustained, pursuant to 15 U.S.C. §15;

(5) for the assessment of costs and attorneys' fees against defendant Warner Bros., and for such other and

further relief as is just and appropriate under the facts of this case.

Dated: Lake Success, New York
May 28, 1976

Berg and Duffy
Attorneys for plaintiff
3000 Marcus Avenue
Lake Success, New York 11040

by Thomas B. O'Meara
(A Member of the Firm)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
ZIMMEL ASSOCIATES, a New York :
Limited Partnership, :
 : 76 Civ. 1001 (JRB)
Plaintiff, :
 : NOTICE OF MOTION
-against- :
 :
WARNER BROS. INC., :
 :
Defendant. :
----- X

PLEASE TAKE NOTICE that, upon the annexed affidavit of Laurence Greenwald, Esq. sworn to September 28, 1976, the accompanying memorandum of law and the complaint, the undersigned will move this Court at Courtroom 4 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, on the 12th day of November, 1976 at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, dismissing Count 1 of the complaint herein for failure to state a claim upon which relief can be granted to this licensor-plaintiff under Section 4 of the Clayton Act, 15 U.S.C. §15 and Count 2 of the complaint herein for lack of subject matter jurisdiction.

PLEASE TAKE FURTHER NOTICE that in accordance with the conditions upon which motions are to be made before Judge Bartels, all briefs and affidavits in opposition to the motion shall be filed and served by noon of November 4, 1976.

Dated: New York, New York
October 1, 1976

STROOCK & STROOCK & LAVAN

By: 
(A Member of the Firm)
Attorneys for Defendant
Warner Bros. Inc.

61 Broadway
New York, New York 10006
(212) 425-5200

TO: BERG & DUFFY
Attorneys for Plaintiff
3000 Marcus Avenue
Lake Success, New York 11040

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

ZIMMEL ASSOCIATES, a New York	:	
Limited Partnership,	:	76 Civ. 1001 (JRB)
	:	
Plaintiff,	:	<u>AFFIDAVIT</u>
	:	
-against-	:	
	:	
WARNER BROS. INC.,	:	
	:	
Defendant.	:	

----- X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

LAURENCE GREENWALD, an attorney admitted to practice before the Courts of this State, being duly sworn deposes and says:

1. I am a member of the firm of Stroock & Stroock & Lavan, attorneys for defendant Warner Bros. Inc. ("Warner") and am familiar with the matters set forth herein. I submit this affidavit in support of Warner's motion for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss Count 1 of the Complaint for failure to state a claim upon which relief can be granted to this licensor-plaintiff under Section 4 of the Clayton Act, 15 U.S.C. §15 and Count 2 of the Complaint for lack of subject matter jurisdiction.

2. Film Ventures International ("Film Ventures") is the exclusive distributor of the film "Beyond the Door" (the "Film"), pursuant to a license granted to it by Zimmel Associates, plaintiff herein. There is presently pending in the United States District Court for the Northern District of Georgia, Atlanta Division an action instituted by Film Ventures against Warner entitled Film Ventures International, Inc. v. Warner Bros. Inc., et. al., (C75-2297A) (the "Film Ventures Action"). A copy of the complaint in the Film Ventures Action is annexed hereto as Exhibit A. As is clear from the complaint, the subject matter of the Film Ventures Action is identical to the acts complained of by plaintiff herein -- Warner's institution of copyright infringement actions against Film Ventures and its co-defendant exhibitors of the Film.

3. The copyright infringement action commenced by Warner against distributor Film Ventures and two exhibitors of the Film and referred to in paragraph 13 of the Complaint herein is presently pending. (Warner Bros. Inc., et. al. v. Film Ventures International, et. al., Central District of California, No. 72-2774-DWW [Judge David W. Williams]). Warner claims that its copyright in the film "The Exorcist" has been and is being infringed by the distribution and exhibition of the Film. In addition, Warner alleges that it holds the copyright of a written "pressbook" for "The Exorcist" which

pressbook contains, among other things, suggested advertisements designed to assist the promotion of and advertisement for that motion picture. Warner claims that Film Ventures and its co-defendants, by utilizing posters and advertisements for the Film which are a copy of an advertisement which appeared in Warner's copyrighted pressbook, have violated Warner's copyright in said pressbook and have engaged in unfair trade practices and unfair competition against Warner.

4. On October 6, 1975 a hearing was held in the Central District of California action before the Honorable David W. Williams, United States District Judge, on Warner's application for pendent lite injunctive relief against Film Ventures and its co-defendants. On October 10, 1975, Judge Williams granted in part and denied in part this application by a written order. With respect to Warner's pressbook infringement claim that order provides:

"PRESS BOOK INFRINGEMENT"

Plaintiffs claim violation of its copyrights in certain advertisements used in promotion of "The Exorcist." One advertisement (Plaintiffs' exhibit C) shows a door partially opened with light coming through into a dark room. Defendant's advertisement (Plaintiffs' exhibit e) shows substantially the same door with the same effect of light entering a darkened room. The only difference between the two advertisements is the addition of the possessed woman's face in the defendant's advertisement and the different titles. Otherwise the scenes are identical and obviously in-

fringe plaintiffs' rights if this advertisement was properly copyrighted.

Defendant claims that since the advertisement was first published on February 15, 1974 in the Los Angeles Times without a valid copyright mark, defendant's use of the door cannot be said to infringe. Plaintiffs admit that no copyrighted mark appeared on the February 15th advertisement but that a valid copyright for the Warner Bros. press book containing this advertisement was obtained on February 17th, 1974. They further assert that the copyright which the Los Angeles Times has over all of its material protects plaintiffs' advertisement. I agree with this contention and grant an injunction against further use by defendant of the door advertisement. Nimmer, §24.41 at p. 109; 17 U.S.C. §3.

Plaintiffs bring one further complaint which has merit. Defendants, in advertising the picture "Beyond" use a letter "T" in the second word of the title which is intentionally designed to resemble a crucifix. "The Exorcist" has a basic religious theme where through faith the evil spirit is driven from Regan by priests. A crucifix is used as a part of the ritual. In an earlier scene, Regan, crazed by the possession, abuses herself sexually with a crucifix. Thus a crucifix is given great importance by the producers of plaintiffs' film in the depiction of the girl's agony and in the performance of the religious rite. The theatre public is aware of this. It is therefore a practice of unfair competition on the part of the exhibitors of "Beyond" a picture having no religious theme and which at no time portrays a crucifix, to prominently (or at all) display a crucifix in its advertising of the picture. There is thus created a suggestion that "Beyond" is a

sequel to "The Exorcist" and possibly that it was produced by the same craftsman who skillfully produced "The Exorcist", and that it might be a film of the superior quality of "The Exorcist", which it is not. The defendants are directed to forthwith withdraw the use in any way or manner the advertisement or any other display of the name "Beyond The Door" using a cross or crucifix or any elongated form of the letter "T" as contained in the advertisement now in use and of the open door advertisement. Such discontinuance of the use of these or any similarly deceptive ads shall remain in full force and effect until the further order of this Court.

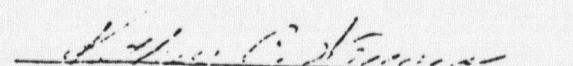
A-18

The petition to enjoin the continued exhibition of "Beyond" is denied but defendants are enjoined from the continued use of the advertisement mentioned hereinbefore."

We submit that Judge William's order belies any suggestion that Warner's conduct in bringing the copyright infringement action against Film Ventures violates the antitrust laws. As more fully set forth in the accompanying memorandum of law, even assuming arguendo plaintiff's standing to sue, Warner's institution of this and other copyright infringement actions clearly is immune from attack under the antitrust laws based upon the Noerr-Pennington doctrine. Accordingly, I respectfully submit that such immunity mandates the dismissal of the first count of the Complaint.


LAURENCE GREENWALD

Sworn to before me this
28th day of September, 1976.


Notary Public

KATHIE C. WALLACE
Notary Public, State of New York
No. 41-413676
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILM VENTURES INTERNATIONAL,)
INC,)

Plaintiff)

vs.)

CIVIL ACTION NO. C-12677

WARNER BROS., INC., WARNER BROS.)

DISTRIBUTING CORP., WARNER)

COMMUNICATIONS, INC. and)

J.C. STEELY, individually)

Defendants)

C O M P L A I N T

COMES NOW Plaintiff, Film Ventures International, Inc.,
a Georgia corporation, stating its Complaint against the
Defendants as follows:

COUNT ONE

1.

Plaintiff is and at all times herein mentioned was a
corporation duly organized and existing by law of the State
of Georgia with its offices at 2351 Adams Drive, Suite C,
Atlanta, Fulton County, Georgia, 30318, and is engaged in the
business of distributing motion pictures for theatrical
exhibition throughout the United States.

2.

Defendant, Warner Bros. Inc., is and at all times herein
mentioned was a foreign corporation deriving substantial
revenue from goods used and services rendered in Fulton
County, Georgia, and is subject to the jurisdiction of this
Court pursuant to Ga. Code Ann. §24-113.1(c), 1966 Ga. Laws 343,
as amended, and venue is proper; said defendant is a
subsidiary of Defendant Warner Communications, Inc.

3.

Defendant, Warner Bros. Distributing Corp., is
and at all times herein mentioned was a foreign corporation
qualified to do business in the State of Georgia with its

registered office and agent being Prentice Hall Corporation Systems, Fulton Federal Building, Atlanta, Fulton County, Georgia, and is subject to the jurisdiction of this Court and venue is proper; said Defendant is a subsidiary of Defendant Warner Bros., Inc.

4.

Defendant, Warner Communications, Inc., is and at all times herein mentioned was a foreign corporation deriving substantial revenue from goods used and services rendered in Fulton County, Georgia, and subject to the jurisdiction of this Court pursuant to Ga. Code Ann. §24-113.1(c) 1966 Ga. Laws 343, as amended, and venue is proper.

5.

Defendant, J.C. Steely is and at all times herein mentioned was an individual and resident of Fulton County, Georgia, and the manager of the office of Defendant, Warner Bros. Distributing Corp., located in Fulton County, Georgia, and is subject to the jurisdiction of this Court and venue is proper.

6.

On or about December, 1974, Plaintiff entered into a written contract with the owners of a motion picture entitled "Beyond The Door" for the exclusive distribution by Plaintiff of said motion picture throughout the United States.

7.

On or about May 2, 1975, Plaintiff commenced the release and distribution of "Beyond The Door" and in connection with such distribution entered into numerous exhibition contracts with theater owners (herein "Exhibitors") for the theatrical showing of the motion picture throughout the United States. Under these exhibition contracts, Plaintiff is entitled to receive a certain percentage of the box office receipts from the theatrical exhibition of said motion picture, as its fee.

Defendants, Warner Bros., Inc., and Warner Bros. Distributing Corp are the alleged owner and distributor of a motion picture named "The Exorcist." The Exorcist has been distributed throughout the United States and Plaintiff is informed and believes that Defendant, Warner Bros., is producing and plans to distribute a sequel to "The Exorcist" to be entitled "The Exorcist, Part II."

9.

Warner Bros., Inc., has conspired with Defendants Warner Communications, Inc., Warner Bros. Distributing Corp., and J.C. Steely to interfere with the contractual relations and business between the Plaintiff and exhibitors of "Beyond The Door" as set out in the following paragraphs.

10.

On or about August 19, 1975, Defendant, Warner Bros., Inc., et al, instituted a lawsuit in the United States District Court, Central District of California (Case No. CV75-2774-DWW) alleging, inter alia, that "Beyond The Door" infringes the copyright of "The Exorcist" and charging Plaintiff with infringement and unfair competition by virtue of the distribution of "Beyond The Door."

11.

On or about October 10, 1975, after consideration of extensive evidence, briefs and oral arguments, the United States District Court for the Central District of California denied the motion of Warner Bros., Inc., for Injunctive Relief against distribution and exhibition of "Beyond The Door," and entered an Order finding that any similarity between the two movies was the result of a common theme, and "neither Blatty [the author] nor [Warner Bros., Inc.] have the right to claim a monopoly in giving expression to this phenomena." Said Order was not appealed by Warner Bros., Inc.

12.

Subsequent to the Court Order in Paragraph 11 above, Plaintiff is informed and believes that, Defendant, Warner Bros., Inc., instituted lawsuits in Denver, Colorado; Chicago, Illinois; and New Orleans, Louisiana; against Exhibitors who have contracted with Plaintiff for the theatrical exhibition of "Beyond The Door."

13.

Defendants have also contacted various Exhibitors who have exhibited or contracted to exhibit "Beyond The Door" disparaging said movie and threatening economic reprisals and lawsuits against Exhibitors showing "Beyond The Door."

14.

The course of conduct hereinabove alleged by Defendant Warner Bros., Inc., and the other Defendants, was undertaken with full knowledge of Plaintiff's contracts with Exhibitors for the theatrical exhibition of "Beyond The Door." This was done without any legal justification and was willful and malicious and done in pursuance of a conspiracy among the Defendants for the purpose of harassing Plaintiff and interfering with the contractual and business relations between the Plaintiff and Exhibitors and to frighten and coerce Exhibitors into failing to perform their contracts with Plaintiff, failing to exhibit "Beyond The Door", failing to turn over the box office receipts to Plaintiff in accordance with the exhibition contracts, and to no longer do business with Plaintiff.

15.

Plaintiff's contractual property rights with these Exhibitors have been unlawfully interfered with and damaged by the Defendants.

16.

The foregoing acts by Defendants were done in order to

further the commercial interests of Defendants, to unlawfully restrain and prevent competition by Plaintiff in the distribution of "Beyond The Door," and to unlawfully preempt the market for distribution and theatrical exhibition of motion pictures dealing with the subject of demonic possession to the benefit of Defendants and to enhance the profits from "The Exorcist" and its sequel.

17.

As a result of the Defendants' malicious conduct and conspiracy, Plaintiff has been damaged and deprived of a sum estimated to be in excess of NINE HUNDRED FIFTY THOUSAND DOLLARS (\$950,000.00) from its percentage of box office receipts currently held by Exhibitors and by Exhibitors who have failed to deal with Plaintiff or exhibit its movie and by reason thereof, Plaintiff's business has been and will continue to be irreparably harmed.

18.

In addition to the above and foregoing unlawful interference with Plaintiff's business, Defendants are threatening to continue similar unlawful interference with Plaintiff's business unless restrained and enjoined by this Court.

19.

If Defendants are not restrained and enjoined from pursuing this unlawful and tortious course of conduct hereinabove alleged, it will be necessary for Plaintiff to file actions for damages against Exhibitors to collect lawful film rentals and there will be a multiplicity of actions. Consequentially, Plaintiff has no adequate remedy at law, and unless Defendants are enjoined and restrained from doing, or attempting to do, the acts above enumerated, the Plaintiff will suffer irreparable injury.

COUNT TWO

20.

Plaintiff realleges and incorporates by reference in

this Count, the allegations of Count One, Paragraphs 1-19 above.

21.

Notwithstanding that the copyright laws of the United States prohibit the monopolization of a theme or subject matter and in furtherance of the wrongful objectives and conspiracy set out herein, Defendant, Warner Bros., Inc., has filed or caused to be filed copyright infringement actions against other makers and distributors of motion pictures dealing with the subject of demonic possession both within the United States and, on information and belief, abroad.

22.

The acts and conspiracy of Defendants constitute unfair competition, and unfair and deceptive trade practice, and should be restrained and enjoined and Defendants required to pay damages therefore.

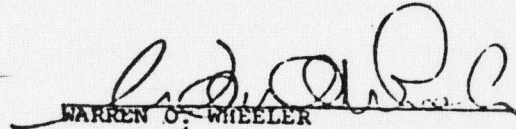
WHEREFORE, Plaintiff prays:

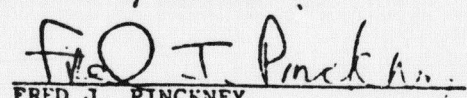
(a) that Defendants be temporarily and permanently restrained and enjoined from interfering with Plaintiff or its business by threats and disparagement directed to Plaintiffs' Exhibitors or prospective Exhibitors;

(b) that Defendants be temporarily and permanently restrained and enjoined from instituting lawsuits against Exhibitors of Plaintiff for alleged copyright infringement;

(c) that Plaintiff have judgment against Defendants in the sum of NINE HUNDRED FIFTY THOUSAND DOLLARS (\$950,000.00) plus such additional sum as may be incurred as actual damages, plus ONE MILLION DOLLARS (\$1,000,000.00) punitive damages, the costs of this action and reasonable attorneys' fees;

(d) that Plaintiff have such other relief as may be just and proper.


WARREN O. WHEELER

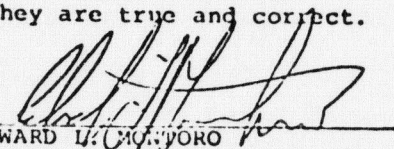

FRED J. PINCKNEY

Attorneys for Plaintiff

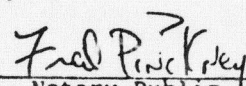
Schreeder, Wheeler & Flint
1600 Candler Building
Atlanta, Georgia 30303
phone: 404-681-3450

VERIFICATION

Personally appeared before the undersigned Notary Public,
EDWARD L. MONTORO, President of Film Ventures International,
Inc., being duly sworn, deposes and says that the facts stated
in the foregoing Complaint are true and correct and that as
to those stated on information and belief that he has been
informed and verily believes that they are true and correct.


EDWARD L. MONTORO

Sworn to and subscribed
before me on this the
18 day of November,
1975.


Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Mar. 9, 1979

THE SUPERIOR COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

Civil Action, File Number

C-12677

Film Ventures International, Inc.

VERSUS

Warner Bros., Inc., Warner Bros. Distributing
Corp., Warner Communications, Inc. and
J.C. STEELY, individually
2927 Sylvan Road
E. Point, Georgia

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon
Warren O. Wheeler
1600 Candler Building, Atlanta, Georgia, 30303, an answer to the complaint

which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of
the day of service. If you fail to do so, judgment by default will be taken against you for the relief
demanded in the complaint.

This _____ day of _____, 19 _____

NOV 18 1975

Deputy Clerk

To Defendant upon whom this petition is served:

This copy of complaint and Summons was served upon you _____ 11-21-1975

Deputy Sheriff

A-27

COPY

No. 6-12677

Fulton Superior Court

Film Ventures International, Inc.

VERSUS

Warner Bros., Inc., Warner
Bros. Distributing Corp.,
Warner Communications, Inc.
and J.C. Steely, individually

Filed in Office, this the -----

NOV 12 1975
day of -----, 19

W. J. Miller Deputy Clerk

Recorded Writs ----- Page -----

the day of -----, 19

----- Clerk

Warren O. Wheeler
Schreeder, Wheeler & Flint
1600 Candler Building
Atlanta, Georgia 30303

404-681-3450 Plaintiff's Attorney.

Sheriff's Writ Document ----- Page -----

AFFIDAVIT OF JAMES P. DUFFY, III IN OPPOSITION TO
THE MOTION

A-28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

ZIMMEL ASSOCIATES, a New York
Limited Partnership,

Plaintiff,

-against-

WARNER BROS., INC.,

Defendant.

AFFIDAVIT

Civil Action No. 76 C 1001

-----X

STATE OF NEW YORK)

(ss.:

COUNTY OF NASSAU)

James P. Duffy, III, being duly sworn, deposes and
says:

(1) My firm is counsel to Zimmel Associates, a
New York limited partnership, that owns the American rights
in and to a motion picture film entitled "Beyond the Door,"
and I am fully familiar with the facts relevant to the
issues raised on this motion.

(2) "Beyond the Door" deals with the general
subject matter of demonic possession, and, up to now, the
film has been well received by the public. To capitalize on
the current popularity of films dealing with the subject of
demonic possession, numerous other film producers and dis-

tributors have come on the market with films concerning the same subject matter.

(3) There is no telling whether the taste of the public for films concerning demonic possession will continue. Suffice it to say the plaintiff has been advised by its distributor that it was planning to rerelease the film in or about March 1977. However, the distributor has further advised us that owing to the defendant's having instituted several law suits against theaters showing "Beyond the Door," and its well-publicized threats to sue anyone showing the film for copyright violation, it has become very difficult to obtain commitments from theaters to schedule "Beyond the Door" for showing at that time.

(4) The threat of litigation has, for practical purposes, made it impossible for the film to be rereleased.

(5) It hardly requires any great degree of business sagacity to understand why theater owners are reluctant to contract to show a film where they know that, if they do, they will be sued by a rich and powerful company. No one wishes to buy a lawsuit, and the defendant has made it well known in the industry that any theater that engages to show "Beyond the Door" is buying a lawsuit.

(6) Annexed hereto as Exhibit 1 is a copy of a

decision rendered by the California court on which the defendant relies to show that its actions have been taken in good faith. It is obvious from that court's decision that the film "Beyond the Door" in no way violated any of the defendant's copyrights. All that the court found was that a newspaper advertisement and the publicity pressbook issued by the distributor to help promote the film may have violated some of the defendant's copyrights.

(7) The defendant's leap from a claim that certain newspaper advertisements violate their copyrights to charge the film "Beyond the Door" with violation of those copyrights is an obvious subterfuge for its true purpose -- namely, getting "Beyond the Door" off the market in anticipation of the release of "Exorcist II."

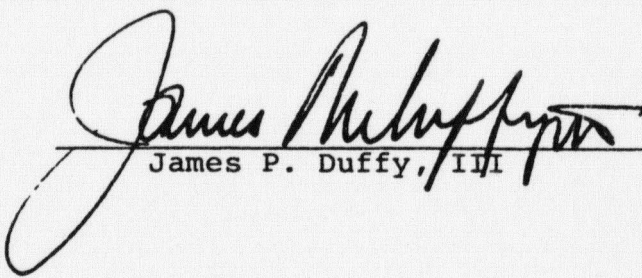
(8) Annexed hereto as Exhibit 2 is a copy of a communication from the defendant to the international distributors of "Beyond the Door" clearly showing that the claim that defendant has the purpose and intent of eliminating "Beyond the Door" from the market in anticipation of its release of "Exorcist II" has substance and merit. Defendant's cable includes the following:

"If our request for total withdrawal of 'Beyond the Door' in international market is impossible due to pre-existing contracts, then your client

should nevertheless at least in the following markets, restrict the play of 'Beyond the Door' for a sufficient period of time to be agreed upon to protect initial openings of 'Exorcist II -- The Heretic. . . .'

(9) The only sure injury resulting from the defendant's attack on "Beyond the Door" is to the plaintiff. Whether or not the plaintiff's distributor will suffer any loss of profits depends upon how successful the rerelease of "Beyond the Door" is likely to be. Since the plaintiff's revenue from the showing of "Beyond the Door" is based upon the gross rentals and not the distributor's net profit, it is clear that the plaintiff is certain to suffer damage and injury from the defendant's anti-competitive attack on "Beyond the Door."

(10) For the reasons set forth above, I respectfully request that the court deny the defendant's motion in its entirety.


James P. Duffy, III

Sworn to before me this
3rd day of November 1976.

Beatrice M. Karles

BEATRICE M. KARLES
Notary Public, State of New York
No. 30-208800
Qualified in Nassau County
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WARNER BROS. INC.,
a corporation and
HOYA PRODUCTIONS, INC.,
a corporation,

Plaintiffs,

vs.

FILM VENTURES INTERNATIONAL,
a corporation, MANN THEATRES
CORPORATION OF CALIFORNIA,
a corporation, and PACIFIC
THEATRES CORPORATION, a
corporation,

Defendants.

No. CV 75-2774-DWW

ORDER ON PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

Plaintiffs have produced a film "The Exorcist" which has met with great public acclaim and has been said to be the most terrifying motion picture ever made. The producers contend that the film was produced at a cost of over \$10 million and has grossed over \$100 million by exhibiting it to more than 100 million viewers world-wide. In this action, plaintiffs sue the distributors and exhibitors of another film entitled "Beyond The Door" (hereinafter "Beyond") claiming that it infringes copyrightable subject matter contained in "The Exorcist."

William Peter Blatty wrote the novel "The Exorcist" and then assigned the film rights to plaintiffs and assisted

1 up its allegedly infringing material.

2 At the outset it is important to note that Warner
3 Bros. does not claim that there is any similarity of
4 story or plot in the two film, for indeed there is not.^{1/}
5 Rather, plaintiffs claim that the infringement is of the
6 character of Regan and of the cinematic effects used in
7 "The Exorcist" as a means of story expression. These effects
8 include distinctive sounds, special lighting effects,
9 levitation of Regan's body and the bed she is confined to,
10 the spinning of the girl's head 360° and the rolling back
11 of her eyes with pupils covered.

12 Both film depict objects such as chairs and
13 tables flying through the air and show dresser drawers
14 opening and shutting as a result of some unseen force. Both
15 also show human bodies being propelled with great force
16 across a room. Both possessed persons undergo voice changes
17 which you are to believe is the devil speaking from within,
18 and both persons spew vomit at those attempting to perform
19 the ritual. In "Beyond", the character Jessica reacts to
20 the spell by experiencing an abbreviated pregnancy and at
21 one point one of her eyes moves back and forth while the
22 other stares straight ahead. In another scene her head
23 turns approximately 180°, or half the spin effected by
24 Regan. In "The Exorcist" religious techniques based upon
25 faith are used to drive the devil from the possessed girl
26 but no similar religious theme finds its way into "Beyond."

27 Blatty first learned of the phenomenon of exorcism
28 when an actual happening of a possession was described to
29 -----
30

31 ^{1/} At the request of counsel for both sides the Court
32 viewed a screening of "The Exorcist" on October 3, 1975 and
of "Beyond The Door" on October 4, 1975-both at public
theaters.

1 in producing the photoplay based upon the book. It concerns
2 the demonic possession of the character Regan, a 12-year old
3 girl, and the performance of the religious ritual of exorcism
4 to rid her of the spell when medical science fails to do so.
5 The underlying theme includes the battle between good and evil
6 and how faith can overcome the possession and bring about
7 triumph over the devil. In developing this, there was con-
8 siderable use of symbolism.

9 The motion picture shows the progression of physical
10 and emotional infirmities which slowly overcome Regan until
11 she is eventually transformed into a horrid, foul-mouthed,
12 vomiting monster with super-human strength.

13 The theme of "The Exorcist" deals with the classic
14 battle of good versus evil. Regan's mother, having sought
15 the aid of medical science to no avail, turns to the
16 Catholic Church, and two Jesuit priests ^{are} ~~were~~ designated to
17 conduct an exorcism. After a long ordeal and at the cost
18 of their own lives, the priests succeed in casting the demon
19 from the girl who then returns to her childlike composure.

20 "Beyond" also portrays demonic possession, but of
21 a mature pregnant woman, Jessica, and to a lesser extent to
22 one of her children. While a religious theme and the element
23 of faith dominate plaintiffs' film, it has no part in the
24 development of "Beyond", a film centered upon the use of the
25 supernatural or occult powers to rid the possessed person
26 of the forces of evil.

27 Before the Court is plaintiffs' motion for a pre-
28 liminary injunction to enjoin the alleged infringement of
29 "The Exorcist"; to prevent future exhibition of "Beyond"; to
30 prevent the use by defendants of advertising material which
31 plaintiffs contend infringes a press book it prepared to
32 exploit "The Exorcist", and to compel defendants to deliver

1 him by a Jesuit priest in college.^{2/} Neither Blatty nor
 2

3 2/ William Peter Blatty, in an affidavit produced by
 4 defendant, tells of the origin of his idea to write the book
 5 "The Exorcist." He states that while a student at George-
 6 town University he attended a class dealing with problems
 7 of religious faith and that a Jesuit priest told of a
 8 case of possession and subsequent exorcism which had actually
 9 taken place in Washington, D.C. in 1947, and that had
 10 received local newspaper coverage. Blatty's subsequent
 11 research convinced him that an actual case of possession
 12 had indeed occurred involving a boy, the son of a prominent
 13 Washington, D.C. family, and he considered writing a book
 14 that would relate the incidents of the occurrence in a
 15 fictional setting. His research taught him that the boy
 16 in the real occurrence had a superficial interest in the
 17 occult and embarrassed his mother's guests by revealing
 18 humiliating knowledge about them which he could not have
 19 learned through any normal means. The boy then began to
 20 cry aloud at night, complained that his bed was shaking and
 21 moving across the room. The boy then became "a little
 22 demon in language and behavior, addressing his mother
 23 and others in terms that would make a sea captain blanch."
 24 (Aff. p. 6).

15 The mother sought in vain to get medical help for
 16 her son and finally consulted her minister who advised her
 17 that a Catholic priest claimed to be able to handle phenomena
 18 such as this through exorcism. Eventually an exorcist was
 19 summoned and the ritual was commenced and lasted for many
 20 weeks.

18 Blatty's affidavit goes on to say that because of
 19 the strength of the boy and his violent disposition, he had
 20 to be strapped into his bed; he urinated endlessly and
 21 accurately and over great distances, with the exorcist as
 22 his target; he vomited a green substance sufficient in
 23 volume to fill the entire room. The boy's voice altered
 24 to that of a deep and husky tone and his face became the
 25 face of someone else. He began speaking in three languages,
 26 allegedly unknown to him previously, and he was violent
 27 and abusive to the priests who were conducting the
 28 exorcism.

24 In writing his book, Blatty changed the possessed
 25 person from a boy to a girl and changed the location from
 26 Washington, D.C. in order to protect the persons actually
 27 involved in the occurrence.

27 This affidavit was filed by Blatty in another law-
 28 suit filed in this district, (Russel v. Blatty, No. 71-184-IH)
 29 in which the plaintiff, author of a novel entitled The Case
 30 Against Satan, contended that the novel The Exorcist
 31 infringed his book. In the role of a defendant, Blatty made
 32 many statements in his affidavit that come to the support of
 the position of defendant Film Ventures in the instant
 lawsuit.

31 -----

32 -----

1 nor plaintiffs have the right to claim a monopoly in givin
2 expression to this phenomenon. When one thinks of a
3 possessed person he thinks of a person full of inner turmoil
4 and in a long struggle with an evil spirit. The idea seems
5 to be one of the inner person fighting the devil possessing
6 him. One means of giving expression to this characteri-
7 zation is to show the possessed person writhing, vomiting
8 and contorting in a frenzied manner and undergoing rapid
9 physical transformation. The producers of both "The
10 Exorcist" and "Beyond" have used the commonly accepted phy-
11 sical ways of depicting the struggle of the possessed one,
12 and some of the means used are common to each depiction, but
13 neither means is original or subject to copyright. While
14 "The Exorcist" was expensively produced with the aid of
15 costly special effects and makeup technicians and "Beyond"
16 is an inferior picture with a low production budget, the latter
17 cannot be said to have trampled upon cinematic techniques
18 which were the exclusive property of plaintiffs.

19 "one work does not violate the copyright
20 in another simply because there is a simi-
21 larity between the two, if the similarity
22 results from the fact that both works deal
23 with the same subject, or have made use of
24 common sources." Harold Lloyd Corp. v. Witwer,
25 65 F.2d 1 (9th Cir. 1933) citing 13 C.J.
26 §278 p. 1114.

27 CHARACTER PROTECTIBILITY

28 Plaintiffs urge that in the character Regan they
29 have a property that is protectible under the copyright laws
30 and which defendant has copied with its character Jessica.
31 Ordinarily, characters in a play are not protectible.
32 Columbia Pictures Corp. v. National Broadcasting Co., 134

1 F.Supp. 348, 353 (S.D. Cal. 1955). Cases that uphold copy-
2 right protection of a character are those where the charac-
3 ter was distinctively delineated by the author and such
4 delineation was copied. Nimmer on Copyrights, §30. Judge
5 Learned Hand has written that "It follows that the less
6 developed the characters, the less they can be copyrighted;
7 that is the penalty an author must bear for marking them too
8 indistinctively." Nichols v. Universal Pictures Corp.,
9 45 F.2d 119, 121 (2nd Cir., 1930).

10 In Warner Brothers Pictures, Inc. v. Columbia
11 Broadcasting System, Inc., 216 F.2d 945 (9th Cir., 1954)
12 the Court held that the Sam Spade character was not
13 protectible and found that no character is protectible under
14 copyright law unless "the character really constitutes the
15 story being told" and is not merely a "chessman in the game
16 of telling the story."^{3/}

17 The Walt Disney Mickey Mouse cartoon character was
18 held protectible under this test in Walt Disney Productions
19 v. Air Pirates, 345 F.Supp. 108 (N.D. Cal. 1972) because the
20 "plot of the piece not only centers around the character but
21 is quite subordinated to the characters role (and)...the
22 principal appeal of each of the plaintiffs work to the
23 primary audience of children for which they were intended
24 lies with the character and nothing else." P.113. That
25 Court found that the cartoon character(s) as developed by
26 Disney had achieved a high degree of recognition and
27 identification that was protectible.

28 I cannot conclude that the story "The Exorcist"
29 was subordinated to the character Regan. Even, arguendo,
30

31 ^{3/} This holding is criticized by Professor Nimmer in
32 his work on Copyright, §30 pp. 134.2-134.3.

1 if this were held to be true, there is substantial difference
2 between the character of Regan, a demure child who turns
3 into a profane monster and whose possession is driven
4 from her by religious means, and Jessica, a mature woman in
5 the early stages of pregnancy whose possession exemplifies
6 itself by a more rapid than normal development of her fetus,
7 and whose possession is not expelled by religious faith.

8 The issuance of a preliminary injunction in an
9 infringement action is within the sound discretion of the Court
10 Dymo Industries v. Marcus Bros. Textile Corp., 326 F.2d 141
11 (9th Cir., 1964). Such harsh action should not be undertaken
12 unless plaintiffs have convinced the Court by its evidence
13 that there is a great likelihood of infringement by defendant
14 and there is reasonable certainty that plaintiffs will
15 prevail at a trial on the merits. Nimmer §157.1; American
16 Visual Corp., v. Holland, 261 F.2d 652 (2nd Cir., 1958).

17 Since plaintiffs do not contend that "Beyond" copies
18 the plot of "The Exorcist" it contends it is damaged because
19 defendant's picture has appropriated the manifestations,
20 visual and aural presentation and special effects which,
21 acting together, blend to create the essence of the motion
22 picture "The Exorcist." Plaintiffs assert that it is the
23 cinematic elements such as sound effects, lighting, levi-
24 tation and makeup design by which the Blatty novel was
25 given expression into another art form by the film maker
26 and that this was copied by defendant's film.

27 Defendants contend that the use of flickering
28 lights, raucous "haunted-house type" noises, flying bodies
29 and objects about a room, levitation and the changing of
30 human features from placid to gruesome are theatrical tricks
31 which have for many years been used in other films and stage
32 plays. They deny that "Beyond" has attempted to group

1 the use of its special effects in a manner that shows sub-
2 stantial similarity to the grouping used in "The Exorcist."
3 To view the two pictures is to find substantial merit to this
4 argument. It is also evident that "Beyond" does not make a
5 blatant effort to use a character similar to that used in
6 the Exorcist or to duplicate the phenomenon contrived to rid
7 the character of the evil spirit. In "The Exorcist"
8 religious techniques based upon faith are used to drive
9 the devil from the possessed girl; no similar religious
10 theme finds its way into the "Beyond" story.

11 PRESS BOOK INFRINGEMENT

12 Plaintiffs claim violation of its copyrights in
13 certain advertisements used in promotion of "The Exorcist."
14 One advertisement (Plaintiffs' exhibit C) shows a door
15 partially opened with light coming through into a dark
16 room. Defendant's advertisement (Plaintiffs' exhibit e)
17 shows substantially the same door with the same effect of
18 light entering a darkened room. The only difference
19 between the two advertisements is the addition of the
20 possessed woman's face in the defendant's advertisement and
21 the different titles. Otherwise the scenes are identical
22 and obviously infringe plaintiffs' rights if this advertise-
23 ment was properly copyrighted.

24 Defendant claims that since the advertisement
25 was first published on February 15, 1974 in the Los Angeles
26 Times without a valid copyright mark, defendant's use of the
27 door cannot be said to infringe. Plaintiffs admit that no
28 copyright mark appeared on the February 15th advertisement
29 but that a valid copyright for the Warner Bros. press book
30 containing this advertisement was obtained on February 17th,
31 1974. They further assert that the copyright which the
32 Los Angeles Times has over all of its material protects

1 plaintiffs' advertisement. I agree with this contention
2 and grant an injunction against further use by defendant
3 of the door advertisement. Nimmer, §24.41 at p. 109; 17
4 U.S.C. §3.

5 Plaintiffs bring one further complaint which has
6 merit. Defendants, in advertising the picture "Beyond"
7 use a letter "T" in the second word of the title which is
8 intentionally designed to resemble a crucifix. "The
9 Exorcist" has a basic religious theme where through faith
10 the evil spirit is driven from Regan by priests. A crucifix
11 is used as a part of the ritual. In an earlier scene, Regan,
12 crazed in the possession, abuses herself sexually with a
13 crucifix. Thus a crucifix is given great importance by the
14 producers of plaintiffs' film in the depiction of the girl's
15 agony and in the performance of the religious rite. The
16 theatre public is aware of this. It is therefore a practice
17 of unfair competition on the part of the exhibitors of "Beyond"
18 a picture having no religious theme and which at no time por-
19 trays a crucifix, to prominently (or at all) display a cru-
20 cifix in its advertising of the picture. There is thus
21 created a suggestion that "Beyond" is a sequel to "The
22 Exorcist" and possibly that it was produced by the same
23 craftsmen who skilfully produced "The Exorcist", and that
24 it might be a film of the superior quality of "The Exorcist",
25 which it is not. The defendants are directed to forthwith
26 withdraw the use in any way or manner the advertisement
27 or any other display of the name "Beyond The Door" using
28 a cross or crucifix or any elongated form of the letter
29 "T" as contained in the advertisement now in use and of
30 the open door advertisement. Such discontinuance of the
31 use of these or any similarly deceptive ads shall remain in
32 full force and effect until the further order of this Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
ZIMMEL ASSOCIATES, a New York
Limited Partnership,

DOCKET NO. 76 C 1001

Plaintiff,

- against -

MEMORANDUM AND ORDER

WARNER BROS., INC.,

Defendant.

----- x
PRATT, J:

By motion argued November 12, 1976 defendant seeks to dismiss Count I of the complaint for failure to state a claim upon which relief can be granted and Count II of the complaint for lack of subject matter jurisdiction. For the reasons discussed below, defendant's motion to dismiss is granted.

Plaintiff, owner of the American rights in and to a film entitled "Beyond the Door", has brought this treble damage action against defendant, a major film producer and distributor, for alleged anticompetitive activities in violation of 15 USC §§ 1 et seq. (Count I) as well as for "unfair competition" (Count II). Plaintiff contends that defendant has embarked on a program of harassment by instituting liti-

gation against distributors and potential exhibitors of "Beyond the Door" in an attempt to clear the market for defendant's premier engagement of "Exorcist II - The Heretic". By instituting and threatening law suits based on "Beyond the Door's" alleged copyright infringement of Warner's earlier film "The Exorcist" as well as its promotional materials, plaintiff argues, the defendant has made it impossible for the plaintiff and its distributor, Film Ventures International, to exploit to the utmost the inherent economic value of the film "Beyond the Door". In December 1974 plaintiff granted Film Ventures an exclusive license to distribute, exhibit, and otherwise exploit "Beyond the Door" in return for the right to receive a portion of the gross receipts. By this action plaintiff thus seeks to recover treble damages as a result of having received no payments under its license agreement with Film Ventures.

In support of its motion to dismiss, the defendant contends that Count I fails to state a claim since (1) plaintiff lacks standing to invoke the treble damage provisions of the antitrust laws; (2) litigation against exhibitors and distributors is exempt from antitrust liability by virtue of Eastern R.R. Presidents Conference v. Noerr Motor Freight.

Inc., 365 US 127 (1961); United Mine Workers v. Pennington, 381 US 657 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 US 508 (1972); and their progeny; and (3) plaintiff has failed to define an identifiable relevant market which defendant is alleged to be monopolizing. In addition, defendant argues, since plaintiff has thus failed to state a federal claim in Count I, the court should decline to exercise pendent jurisdiction over the nonfederal claim pleaded in Count II.

Section 4 of the Clayton Act, 15 USC §15, provides in relevant part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *." Nonetheless, only those whose commerce has been directly injured by the alleged violation may invoke this section since incidental harm which may come to persons by virtue of their relationship to those directly injured does not give rise to standing to sue for relief under the Clayton Act. See, e.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F2d 1292 (CA2 1971), cert. denied, 406 US 930 (1972); SCM Corp. v. Radio Corporation of America, 407 F2d 166 (CA2), cert. denied,

395 US 943 (1969); Productive Inventions, Inc. v. Trico Products Corp., 224 F2d 678 (CA2 1955), cert. denied, 350 US 936 (1956); Fields Productions, Inc. v. United Artists Corp., 318 F Supp 87 (SDNY 1969), aff'd, 432 F2d 1010 (CA2 1970), cert. denied, 401 US 949 (1971). The threshold question, then, is whether the defendant's allegedly anticompetitive activities have injured the plaintiff directly. This court finds they have not.

In Productive Inventions, Inc. v. Trico Products Corp., 224 F2d 678 (CA2 1955), cert. denied, 350 US 936 (1956), the Second Circuit approved dismissal of the complaint of a patent licensor who claimed that its royalties were reduced as a result of the damage done to its licensee by defendant's violations of the antitrust laws. Not unlike the case at bar, Productive Inventions, the patentee, had granted Anco an exclusive license to manufacture and sell windshield components under its patents, with Productive Inventions' sole interest limited to the right to receive royalties on Anco's sales. The court of appeals held that any damage sustained by Productive Inventions was not "direct" within the meaning of section 4 of the Clayton Act and that "any financial loss suffered by plaintiff was only incidental to the acts complained of." Id.

at 680. Specifically,

Is a patentee who has granted to another an exclusive license for the term of the patent, upon a royalty basis, a "person * * * injured in his business or property" (within the meaning of Section 4 of the Clayton Act) so as to enable him to recover treble damages for loss of royalties on sales that might have been made by its licensee save for the anti-trust violations of defendant? We hold he is not.

Id. at 679.

Accord, SCM Corp. v. Radio Corporation of America, supra;

Ragar v. T.J. Raney & Sons, 388 F Supp 1184 (ED Ark), aff'd, 521 F2d 795 (CA8 1975).

In the instant case, plaintiff granted an exclusive license to Film Ventures to distribute, exhibit, and otherwise exploit "Beyond the Door"; plaintiff's interest is limited to a right to receive a percentage of the gross receipts from Film Ventures' distribution of the film. Thus, Zimmel Associates is now seeking a treble damage recovery for precisely the same indirect injury which the Trico court held not actionable under the antitrust laws, viz., "loss of royalties on sales that might have been made by its licensees save for the antitrust violations of the defendant." Productive Inventions, Inc. v. Trico Products Corp., supra, 224 F2d

at 679. And, as in Trico, plaintiff has no standing under the antitrust laws to complain of its incidental loss of profits resulting from the activities of Warner Brothers directed at Film Ventures.

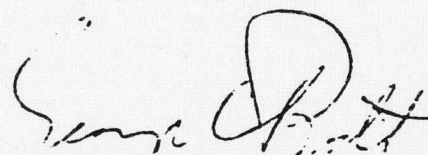
Zimmel Associates as licensor fits squarely within the category announced by Trico and since endorsed by the Second Circuit. E.g., Lilco v. Standard Oil Co., 521 F2d 1269 (CA2 1975); SCM Corp. v. Radio Corporation of America, supra; Billy Baxter, Inc. v. Coca Cola, 431 F2d 183 (CA2 1970) cert. denied, 401 US 923 (1971); and Calderone Enterprises Corp. v. United Theatre Circuit, Inc., supra.

Since plaintiff lacks standing to bring this action under section 4 of the Clayton Act, there is no need to decide whether defendant would otherwise be protected by immunity from antitrust liability or by plaintiff's failure to define a relevant market. Moreover, plaintiff's failure to state a federal claim upon which relief can be granted makes inappropriate the exercise of pendent jurisdiction over the nonfederal unfair competition claim pleaded in Count II of the complaint. See United Mine Workers v. Gibbs, 383 US 715 (1966).

Accordingly, defendant's motion is granted and
the complaint is dismissed.

SO ORDERED.

Dated: Westbury, New York
January 12, 1977

A handwritten signature in dark ink, appearing to read "George C. Pratt", is written over a horizontal line.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

Service of 1 COPY of the
within Appellate is hereby
admitted this 20th day of
April 1977

Signed Heack + Heack + Lewis by Sandra Harg
Attorney for Defendant-Appellee